STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 28, 2009
v	No. 284219 Kalamazoo Circuit Court
TORIAN LEE AYERS, Defendant-Appellant.	LC No. 2007-000008-FH

Before: Talbot, P.J., and Fitzgerald and Hoekstra, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of intentional discharge of a firearm at a dwelling, MCL 750.234b, assault with a dangerous weapon, MCL 750.82, and two counts of possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to concurrent terms of two years' imprisonment for the felony-firearm convictions. The trial court imposed $100 fines for the discharge of a firearm at a dwelling and the felonious assault convictions. Defendant appeals as of right. Because a rational jury, when viewing the evidence in the light most favorable to the prosecution, could find that defendant committed the charged crimes, and because the trial court did not err in scoring offense variable 9, we affirm.

I. Sufficiency of the Evidence

Defendant claims that the prosecutor presented insufficient evidence to allow a rational jury to find him guilty beyond a reasonable doubt. Specifically, defendant argues that the testimony of his alibi witnesses, Alona Lewis and Cerese Bell, "casts a shadow" over whether a rational jury could find him guilty. Defendant also argues that Marquita Dixon's testimony was insufficient for a jury to find that defendant fired a weapon. We disagree. In determining whether a conviction is supported by sufficient evidence, we "must view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999) (quotation omitted). "Circumstantial evidence and reasonable inferences drawn therefrom may be sufficient to prove the elements of a crime." *People v Fletcher*, 260 Mich App 531, 560; 679 NW2d 127 (2004) (quotation omitted).

Dixon testified that when she looked out her bedroom window she saw a crowd of 10 to 15 people on the street. The porch light was on, and Dixon could "see fairly clearly." Dixon saw defendant, whom she had known for 10 years, in the crowd. After someone in the crowd

informed defendant that Dixon was standing in the window, Dixon heard defendant say, "I don't give a f*** who's in the window." Defendant looked at Dixon's bedroom window, and the two made eye contact. The crowd moved away from defendant; nobody remained near him. Dixon then saw a "light" come from defendant's hand, and she heard a bullet hit the house. Although Dixon never saw defendant holding a gun, she was sure it was defendant who shot the gun. Viewing Dixon's testimony in a light most favorable to the prosecution, there was sufficient evidence from which a rational jury could find that defendant was outside Dixon's house on December 10, 2006, and that he was the person who shot at the house.

Lewis testified that she and defendant were at the Boom Boom Room until approximately 3:00 or 3:30 a.m., when they went to Bell's house. Bell testified that defendant, after arriving at her house, did not leave at any time before she went to bed at 5:00 a.m. Although the testimony of defendant's alibi witnesses contradicted the testimony of Dixon, it is for the trier of fact to decide the credibility of the witnesses. *People v Cain*, 238 Mich App 95, 119; 605 NW2d 28 (1999). We will not interfere with the trier of fact's role of determining witness credibility. *People v Williams*, 268 Mich App 416, 419; 707 NW2d 624 (2005). Defendant's convictions are supported by sufficient evidence.

II. Directed Verdict

Defendant claims that because he moved for a directed verdict at the close of his proofs, the trial court erred when it considered only the evidence presented in the prosecutor's case-in-chief in deciding the motion. According to defendant, had the trial court considered the testimony of his alibi witnesses, his motion for a directed verdict would have been granted. In the alternative, defendant argues that even if he did move for a directed verdict at the close of the prosecutor's case-in-chief, the trial court still erred in not considering the alibi testimony when he re-moved for a directed verdict.

Contrary to defendant's assertion, the record does not establish that he moved or re-moved for a directed verdict at the close of his proofs. At the close of the prosecutor's case-in-chief, there was a short bench conference. Immediately thereafter, defendant began his presentation of proofs. After defendant rested and the jury left the courtroom, the trial court stated:

> Mr. Zervic [defense counsel] had a motion. But, as I said, for the purpose of expediency, his motion was preserved; and we will hear that motion now considering only the evidence that was placed into the record up to the time that Mr. Zervic informed the Court that he wished to make a motion.

Defendant then argued his motion for a directed verdict, and he only referred to Dixon's testimony. The trial court denied the motion. The record clearly establishes that defendant only moved for a directed verdict at the close of the prosecutor's case-in-chief and the trial court, for the purpose of expediency, chose to delay hearing arguments on the motion until after defendant presented his proofs.

Because defendant moved for a directed verdict at the close of the prosecutor's case-in-chief, defendant's argument that the trial court erred in not considering the testimony of his alibi

witnesses in ruling on the motion is without merit. Defendant moved for a directed verdict before his alibi witnesses testified.

In addition, we note that the trial court's decision to wait until the close of defendant's proofs to hear arguments on the motion does not violate MCR 6.419(A), which prohibits a trial court from "reserv[ing] decision" on a defendant's motion for a directed verdict that was made after the prosecution's case-in-chief. Here, the trial court did not "reserve decision" on defendant's motion. Although the trial court chose to hear arguments on the motion at the close of defendant's proofs, the trial court ruled on the motion as if it was deciding the motion when it had been made. It only considered the evidence that had been presented up to the time the motion was made.

Regardless, whether one considers only the evidence presented by the prosecutor or also considers the testimony of defendant's alibi witnesses, defendant was not entitled to a directed verdict. A defendant is entitled to a directed verdict if, upon viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could not find that the essential elements of the charged crimes were proven beyond a reasonable doubt. *People v Miller*, 198 Mich App 494, 498; 499 NW2d 373 (1993). In deciding a motion for a directed verdict, a court may not weigh the credibility of witnesses. *People v Peña*, 224 Mich App 650, 659; 569 NW2d 871 (1997), modified in part 457 Mich 885 (1998). As established in Issue I, *supra*, a rational jury, when viewing the evidence in the light most favorable to the prosecution, could find that defendant was the person who shot a gun at Dixon's house on December 10, 2006.

III. OV 9

Finally, defendant contends that the trial court erroneously scored offense variable (OV) 9, MCL 777.39. Specifically, defendant contends that because the information listed Dixon as the only victim of the felonious assault charge and did not list a victim for the discharge of a firearm at a dwelling charge, there was only one victim and, therefore, OV 9 should have been scored at zero points. We disagree. A trial court has discretion in determining the number of points to be scored. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). We will uphold a scoring decision for which there is any evidence in support. *Id.*

In scoring OV 9, the sentencing court is to "[c]ount each person who was placed in danger of physical injury or loss of life" as a victim. MCL 777.39(2)(a); see also *People v Morson*, 471 Mich 248, 261-262; 685 NW2d 203 (2004). Zero points are to be scored if fewer than two people were placed in danger of physical injury or death, while ten points are to be scored if two to nine people were placed in danger of physical injury or death. MCL 777.39(1)(a), (b).

The testimony at trial clearly established that two individuals, Dixon and Gloria Morgan, were present in the house, and both were placed in danger of physical injury or loss of life. Dixon was standing at a window when the first shot was fired. Morgan was asleep in the living room, which had a large picture window that faced the street, and one of the gunshots damaged the upper left-hand portion of the window. The trial court's scoring of OV 9 is supported by evidence in the record. Accordingly, the trial court did not abuse its discretion when it scored ten points for OV 9.

Affirmed.

/s/ Michael J. Talbot
/s/ E. Thomas Fitzgerald
/s/ Joel P. Hoekstra